No. 80-193
IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED,

Petitioners,

vs.

THE GENERAL MOTORS CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE GRAY PANTHERS IN SUPPORT OF PETITIONERS

GILL DEFORD
NEAL S. DUDOVITZ
NATIONAL SENIOR CITIZENS LAW CENTER
1636 West Eighth Street
Los Angeles, California 90017
(213) 388-1381

PAUL S. NATHANSON
UNIVERSITY OF NEW MEXICO
SCHOOL OF LAW
1117 Stanford, N.E.
Albuquerque, New Mexico 87131
(505) 277-5265

Attorneys for Amicus Curiae
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MOTION OF GRAY PANTHERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Gray Panthers respectfully move this court, pursuant to Supreme Court

Rule 36, for leave to file the accompanying brief in this matter as amicus curiae in support of the petitioners in this case. In support of this motion, the Gray Panthers show as follows:

1. The respondent in this action has refused to consent to the Gray Panthers filing an amicus curiae brief in support of the petitioners.

2. Amicus Gray Panthers is a national organization whose membership is composed of both young and old persons throughout the United States who seek to reform and improve institutions and laws that affect the lives of senior citizens. The Gray Panthers have taken a special interest and concern with the structure of the private pension industry in the United States and its impact on older persons.

3. Of particular importance to the Gray Panthers is the scope and meaning of the Employee Retirement Income Security Act of 1974. The Gray Panthers believe that this Act must be interpreted so as to secure pensions for workers and their families and not as a method of depriving persons of their earned retirement

benefits. In support of their views, the Gray Panthers have participated as amicus curiae in many cases where the courts have been called upon to interpret the congressional intent which underlies ERISA. These cases include Daniel v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 551 F.2d 1223 (7th Cir. 1977), rev'd 439 U.S. 551 (1979); Hewlett-Packard Company v. Barnes, 571 F.2d 562 (9th Cir. 1976); and Stone v. Stone, 450 F.Supp. 919 (N.D.Cal. 1978), aff'd --- F.2d --- (September 29, 1980, 9th Cir.). In addition, the Gray Panthers participated as amicus curiae in the decision below of the United States Court of Appeals for the Third Circuit and in the cases of Utility Workers of America v. Consumers Power Company, 453 F.Supp. 447 (E.D.Mich. 1978), appeal pending, Court of Appeals No. 78-1402 (6th Cir.), and Server v. Interpace Corporation, appeal pending, Court of Appeals No. 79-3832 (9th Cir.), all of which involve the same issue that is before the court in this matter.

4. The views of amicus Gray Panthers

are particularly important in this action because of the broad spectrum of plan participant interest represented by this organization. Amicus is in fact a unique elderly organization because its members include persons currently employed in work covered by private pension plans, retired workers who have been denied pension benefits because of offsets similar to that at issue herein, and retirees who have been unaffected by these offsets. The Gray Panthers feel it is critical for the views of plan participants - the consumers of the pension industry - to be heard directly by this court.

5. This case involves significant matters of policy in the private pension arena and presents important questions of first impression involving interpretation of ERISA. ERISA is, as this court has recognized, the first attempt by Congress to significantly regulate the private pension industry in the United States. The first attempts by this court to interpret important sections of that statute are likely to have great impact on the future of private pension plans in this

country. Since private pension benefits are an important element of our income maintenance program and retirement plans of our older citizens, their views should be heard by this court on such matters of significant policy.

6. Amicus Gray Panthers further believes that its views are supplemented and aided by the knowledge and experience of its counsel at the National Senior Citizens Law Center and the University of New Mexico. Attorneys from the law center and the university have had extensive involvement with private pension systems solely on behalf of pension consumers. The National Senior Citizens Law Center in fact has represented individual workers and classes of workers in attempts to gain benefits from dozens of major private pension plans in the United States. In addition to litigation, attorneys for the Gray Panthers were actively involved in the congressional deliberations surrounding the passage of ERISA. This experience has given amicus' attorneys a unique perspective on the impact of this decision on the federal government's income maintenance

policies.

WHEREFORE, it is respectfully moved and requested that the Gray Panthers be granted leave to file the accompanying brief as amicus curiae.

Respectfully submitted,

GILL DEFORD
NEAL S. DUDOVITZ
NATIONAL SENIOR CITIZENS LAW CENTER

PAUL S. NATHANSON
UNIVERSITY OF NEW MEXICO
SCHOOL OF LAW

By GILL DEFORD

Attorneys for Amicus Curiae
Gray Panthers

BRIEF AMICUS CURIAE OF THE GRAY PANTHERS

Interest of the Amicus

A statement describing the Gray Panthers and their interest in this case is set forth in the preceding motion requesting leave to file this amicus curiae brief.

Summary of Argument

Amicus Gray Panthers do not offer argument on all the issues presented by the parties for resolution by this court. Rather, the points suggested by amicus Gray Panthers are designed to show that Internal Revenue Code § 401(a)(5), 26 U.S.C. § 401(a)(5) (dealing with the integration of Social Security retirement benefits) does not provide the basis for a Worker's Compensation offset exception to the general rule of nonforfeitability contained in ERISA § 203(a), 26 U.S.C. § 1053(a) and its parallel provision, Internal Revenue Code § 411, 26 U.S.C. § 411. Amicus maintains all forfeitures are prohibited except those specifically authorized by § 203 or other sections of ERISA. A Worker's Compensation offset is

no where authorized in ERISA and is thus impermissible.

Amicus Gray Panthers further argue that Congress has never authorized a Worker's Compensation offset under I.R.C. § 401(a)(5). Congress' failure to permit a Worker's Compensation offset is consistent with its historical characterization of such benefits as being distinct from retirement benefits and is consistent with this Court's views reflected in its recent decisions involving private pension benefits.

I. OFFSETS OF WORKER'S COMPENSATION BENEFITS AGAINST VESTED RETIREMENT PENSION BENEFITS ARE FORFEITURES SPECIFICALLY PROHIBITED BY ERISA SECTION 203(a), 29 U.S.C. § 1053(a), AND INTERNAL REVENUE CODE SECTION 411(a), 26 U.S.C. § 411.

A. The language, history and purpose of ERISA show Congress' clear intent to protect workers' pension benefits from forfeiture and to narrowly limit exceptions to the general rule of nonforfeitability; and the only allowable exceptions to ERISA's general rule of nonforfeitability are those contained in ERISA §203 or otherwise explicitly authorized by other sections of ERISA.

ERISA § 203, 29 U.S.C. § 1053,[1/] provides

1/ Internal Revenue Code § 411, 26 U.S.C. § 411, is substantially identical.

in part:

> "(a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age. . . ."

Section 203(a)(3) creates four "exceptions", none here pertinent, to the general rule of nonforfeitability.[2/]

ERISA section 3(10), 29 U.S.C. § 1002(19), defines "nonforfeitable" as

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2/ These exceptions cover only the following conditions subsequent:

> (1) the employee's death (unless a joint and survivor annuity is to be provided); (2) the employee's withdrawal of any part of his own mandatory contributions where he is less than 50 percent vested (unless the employee repays the withdrawn contributions with interest); (3) the suspension of payments of benefits attributable to employer contributions during a period in which the employee is re-employed by the same employer under the same plan; and (4) the reduction of the employee's accrued benefit by plan amendment approved by the Secretary of Labor, and only to forestall substantial economic peril to the viability of the plan. (These exceptions were also added to I.R.C. § 411, "Minimum Vesting Standards" for qualification of a trust.)

follows:

> "(19) The term 'nonforfeitable' . . . means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 203(a)(3)." (Emphasis added.)

The broadness and definiteness of the nonforfeitability concept adopted in ERISA was well understood by this Court in its decision last term in Nachman v. Pension Benefit Guarantee Corp., --- U.S. ---, 100 S.Ct. 1723 (1980). The Nachman decision, although ultimately concerning another aspect of ERISA, was premised on this Court's interpretation of 29 U.S.C. § 1002(19). In reaching its conclusion in Nachman, this Court reiterated that the "term 'forfeiture' normally connotes a total loss in consequence of some event . . ." 100 S.Ct., at p. 1732, and that ERISA's nonforfeitability provisions mandate that workers' rights to benefits (except where otherwise explicitly set

forth in the statutes) be "unconditional", 100 S.Ct. 1731.

> "Congress wanted to correct this condition by making sure that if a worker had been promised a defined pension benefit upon retirement - and if he has fulfilled whatever conditions are required to obtain a vested benefit - that he actually receive it." Id., at 1733. (Emphasis supplied.)

The broad rule of nonforfeitability in ERISA employed in Nachman has also consistently been reiterated by the lower federal courts. Thus, in the leading case of Riley v. MEBA Pension Trust, 570 F.2d 406, 409 (2nd Cir. 1977), Judge Friendly states:

> "When § 203(a)(3)(B) provides that certain kinds of suspensions [of pension benefits] are not forfeitures, it necessarily implies that those not falling within its terms are. Cf., Keller v. Graphic Systems of Akron, Inc., 422 F.Supp. 1005, 1008 (N.D.Ohio 1976), (concluding that when ERISA applies, since forfeitures because of post-termination competitive employment are not excepted they are prohibited); 1 CCH Pension Plan Guide, § 2584 (forfeitures for cause). If the language of the statute left any doubt that Riley is entitled to prevail unless the

> conditions of § 203(a)(3)(B)(ii) have been met, this would be removed by the portions of the Conference Report quoted in the margins." (Footnote omitted.)

To the same effect, see Keller v. Graphic Systems of Akron, Inc, 422 F.Supp. 1005, 1008 (N.D.Ohio 1976); Winer v. Edison Brothers Stores Pension Plan and Marshall v. Edison Brothers Stores Pension Plan, consolidated at 447 F.Supp. 836 (E.D.Mo. 1977), aff'd 593 F.2d 307 (8th Cir. 1979); Utility Workers Union of America v. Consumers Power Company, 453 F.Supp. 477 (E.D.Mich. 1978); Buczynski v. General Motors Corporation, 464 F.Supp. 133 (D.N.J. 1978).

The holding of this Court in Nachman and those of other federal courts are buttressed and supported by the legislative history of ERISA. Congress intended a general rule of nonforfeitability of vested retirement pension benefits. Consequently, the House Committee stated:

> "With the limited exceptions noted above, no rights once they are required to be vested may be lost by the employee under any circumstances . . . . For example, a vested benefit is not to be forfeited because the employee

later went to work for a competitor, or in some other way was considered 'disloyal' to the employer." H.Rep. No. 93-807, (1974) U.S. Code Cong. & Admin. News, pp. 4725-6. See also H.Conf.Rep. No. 93-1280, (1974) U.S. Code Cong. & Admin. News, pp. 5052-3.

The Joint Conference Committee further demonstrated Congress' intent in stating that ". . . except as outlined below, an employee's rights, once vested, are not to be forfeitable for any reason." Joint Conference Committee Explanation Statement, (1974) U.S. Code Cong. & Admin. News, pp. 5038, 5052.[3/]

The issue then raised by the present action is whether the Worker's Compensation forfeiture, despite the congressional policy noted above, is otherwise permissible

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3/ The Internal Revenue Service itself has agreed with this understanding of non-forfeitability in ERISA.

"Section 411 of the Internal Revenue Code of 1954 provides that certain benefits must be nonforfeitable. Section 411(a)(3) provides certain exceptions to the nonforfeitability rule. There are no exceptions to the nonforfeitability rule other than those enumerated in § 411(a)(3)." Rev. Rul. 75-480, 1975 - 44 I.R.B.

under ERISA. The Third Circuit, relying on pre-ERISA Internal Revenue Service policy, found that Worker's Compensation forfeitures are comparable to Social Security offsets (generally known as Social Security integration). The court went on to hold that since Social Security integration is a permissible legal forfeiture under I.R.C. § 401(a)(5) (even though not specifically approved by § 203), the Worker's Compensation forfeiture is also valid. Amicus Gray Panthers maintain that respondent's argument is misplaced and not supported by the language or legislative history of ERISA, and that the Third Circuit below erred in its conclusion permitting Worker's Compensation offsets.

In the court below, Judge Garth, writing for the court, premised his arguments on his interpretation of the plaintiffs' contentions. Judge Garth found that the workers could not prevail because their arguments hinged on the fact that all forfeitures are prohibited by § 203 of ERISA, except those stated in § 203 itself. Since Congress approved a Social Security

forfeiture (i.e., Social Security integration) in other sections of ERISA, Judge Garth concluded that § 203 is not, as plaintiffs argued, absolute. As a result, the court below found that there may be other permissible (and, presumably, a limitless number of) forfeitures, such as the Worker's Compensation offset at issue herein.[4/]

The Third Circuit's rendition of the nonforfeitability rule sought by plaintiffs below is, amicus Gray Panthers contend, incorrect. Amicus does not argue that only forfeitures noted in § 203 are valid. Instead, the Gray Panthers contend that in addition to § 203 forfeitures, any other forfeitures specifically adopted by Congress in ERISA are also permissible. Therefore, Social Security forfeitures (integration) are

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4/ The Third Circuit also needs to make at least two other critical assumptions which amicus Gray Panthers dispute. First, the court assumed that Congress did in fact authorize Worker's Compensation offsets prior to ERISA. Second, it finds that Worker's Compensation benefits are similar to retirement pensions and Social Security.

not an implied exception to an absolute rule, but rather a specific congressional directive. On the other hand, there is no statement in ERISA, of any kind, approving Worker's Compensation forfeitures.

The rule that amicus Gray Panthers premises its argument on is that, given the congressional desire embodied in ERISA to severely limit forfeitures of pension benefits, Nachman v. Pension Benefit Guarantee Corporation, supra, all forfeitures are prohibited unless set forth in § 203 or another section of ERISA. Only by adopting this rule can this Court read all sections of ERISA, consistently and as a whole. Had the court below understood these arguments, it could not have reached the same conclusion and instead, Gray Panthers contend, would have supported the pensioners who have brought this action.

If Congress had intended to include Worker's Compensation as an allowable offset or forfeiture, it would have done so specifically. Worker's Compensation offsets is not an area of the law where Congress has historically failed to

legislate in the past. In point of fact, when it deemed appropriate to do so (and not by implication), Congress has specifically legislated that benefits, such as Social Security disability payments, are to be offset by Worker's Compensation benefits. 42 U.S.C. § 424. Congress can specifically and explicitly provide such offsets when it so desires. See Richardson v. Belcher, 404 U.S. 78, 92 S.Ct. 254 (1971) (upholding the Worker's Compensation offset as to Social Security disability).

In addition, given the specifically authorized offset of Worker's Compensation against Social Security disability, it is hard to imagine that Congress intended to provide a double penalty to the injured worker. Cf. Freeman v. Harris, 625 F.2d 1303 (5th Cir. 1980). If the Third Circuit's decision is upheld, however, that is, exactly the result produced. Worker's Compensation could then be offset not only against Social Security disability but also against a worker's vested retirement pension.

Thus, the court below erred by assuming

that if Social Security offsets were permissible under ERISA, so too were Worker's Compensation benefits. Retirement and Social Security offsets are specifically authorized by ERISA (and thus valid exceptions to § 203), but Worker's Compensation offsets have not been specifically authorized by ERISA and cannot be read to be included within the general authority for "retirement" offsets.

B. Internal Revenue Code § 401(a)(5), dealing with a prohibited discrimination in pension benefits, does not provide a Worker's Compensation exception to Congress' clear and unequivocal anti-forfeiture intent and language in ERISA § 203 and I.R.C. § 411.

1. Section 401(a)(5) is intended to allow for integration of pension benefits with Social Security retirement benefits and to avoid prohibited discrimination in the process.

Despite the clear dictates of ERISA noted above, the Third Circuit panel has concluded that pursuant to I.R.C. § 401(a)(5), 26 U.S.C. § 401(a)(5), retirement benefit "offsets" are congressionally authorized and are thus a type of pension

benefit forfeiture allowed in addition to those specifically enumerated in section 203(a)(3) of ERISA. The lower court premised its decision on the belief that Worker's Compensation benefits are "retirement benefits" within the meaning of I.R.C. § 40](a)(5) and are thus permissible forfeitures. Amicus Gray Panthers respectfully disagrees with the lower court's characterization of Worker's Compensation benefits. Instead, amicus contends that Worker's Compensation benefits are not "retirement benefits" within the meaning of I.R.C. § 401(a)(5).

Internal Revenue Code § 401 provides, in pertinent part:

> "(a) . . . Requirements for Qualification. -- A trust * * * forming part of a * * * pension * * * plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section --
>
> * * *
>
> (4) If the contributions or the benefits provided under the plan do not discriminate in favor of employees who are --

(A) officers
(B) shareholders, or
(C) highly compensated. * * *

(5) A classification shall not be considered discriminatory within the meaning of paragraph (4) * * * merely because it excludes employees the whole of whose remuneration constitutes 'wages' under * * * the Federal Insurance Contributions Act * * * Neither shall a plan be considered discriminatory * * * merely because the contributions or benefits based on that part of an employee's remuneration which is excluded from 'wages' * * * [under the Federal Insurance Contributions Act] differ from the contributions or benefits based on employee's remuneration not so excluded, or differ because of any retirement benefits created under State or Federal law."

Both the respondents and the court below would justify their results by relying on the pre-ERISA legislative history of this provision which approves of Social Security integration. Amicus maintains that any attempt to rely on pre-ERISA legislative history is questionable at best and does not provide sufficient support for the conclusions of the court below.

The current status of Worker's Compensation

forfeiture must be evaluated in light of ERISA and that statute's own legislative history. The IRS has itself recognized this need to re-evaluate the meaning of sections of the Internal Revenue Code which were re-enacted by ERISA. In determining the meaning of the anti-discrimination section of the I.R.C., § 401 (which includes the authority for Social Security integration), the IRS has proposed wholly new regulations. See 45 F.R. 24201 (April 19, 1980). These new regulations are needed not because of substantial changes in the wording of the anti-discrimination statute, but because of the congressional intent behind ERISA as reflected in the statutes' legislative history.

This is evidenced by ERISA's adoption for the first time of specific limits on forfeitures of pension benefits. Only forfeitures enumerated in § 203 or specifically authorized in other sections of ERISA now are permissible. Since pre-ERISA statutes do not have comparable provisions, using pre-ERISA legislative history to find the limits

of nonforfeitability is very misleading and wholly inappropriate. As stated before, the Worker's Compensation forfeiture employed in respondent's plan and apparently authorized by IRS regulations does not meet this test and is therefore invalid.

Nevertheless, the legislative history of 26 U.S.C. § 401(a)(5) itself demonstrates that Congress' sole intent from the beginning was only to encourage the establishment of private pension plans which are designed as supplements to benefits available from Social Security. The anti-discrimination provision [§ 401(l)(5)] arose because Congress was particularly concerned that such "integration" not discriminate in favor of officers, stockholders and highly paid employees. H.Rep. No. 2333, 77th Cong., 2d Sess., pp. 50-51, (1942) 2 Cum. Bull. 372, 413.

> "(j) Integration. - Plans which exclude employees who earn less than a specified amount or provide proportionately lesser benefits for such employees may qualify if the benefits under the plan integrate with those provided under

> the social security or similar (e.g., Railroad Retirement Act) program. The total benefits, inclusive of those under the social security or similar program, are used for comparative purposes. If a plan is properly integrated, a classification which excludes all employees who are compensated below the compensation level used for integration purposes will not be considered discriminatory solely because the contributions or benefits based on that part of excluded remuneration differ from contributions or benefits based on that part of remuneration which is not so excluded." Rev. Rul. 65-178, Part 4(5), (1965) Cum.Bull. 294.

In other words, Congress intended to allow for an integrated retirement system where an employee's total retirement package would include Social Security retirement benefits (paid for by employer and employee contributions and computed on the Social Security wage base) and private pension benefits (usually funded solely by employer contributions and computed on wages an employee earned above the Social Security wage base). Since the latter component of the total pension package would benefit only employees earning over

the Social Security wage base, Congress wanted to be certain that such integrated plans would not discriminate in favor of officers, shareholders or highly paid employees. Worker's Compensation offsets were plainly not a factor or consideration for Congress.

The most recent legislative history concerning Social Security integration (accompanying the enactment of ERISA) reiterates Congress' concern solely as to the inequities of pension integration with Social Security. Rather than the flexible, expansive approach characterized by respondents, Congress was in the mood to limit Social Security integration - the only reduction of private pension benefits with which it had ever expressly concerned itself. Thus, Congress added 26 U.S.C. § 401(a)(13) [ERISA § 1201(e)] providing that pension plans may not use subsequent Social Security increases to reduce pension payments to retirees or deferred vested benefits due an employee who leaves prior to retirement. After explaining these changes, House Report No. 93-779 of the House Ways and Means

Committee, (1974) 3 Cum.Bull. 244, at 272, goes on to state:

> "These changes do not affect the ability of plans to use the integration procedures to reduce the benefits that they pay to individuals who are currently covered when social security benefits are liberalized. Your committee, however, believes that such practices raise important issues. On the one hand, the objective of the Congress in increasing social security benefits might be considered to be frustrated to the extent that individuals with low and moderate incomes have their private retirement benefits reduced as a result of the integration procedures. On the other hand, your committee is very much aware that many present plans are fully or partly integrated and that elimination of the integration procedures could substantially increase the cost of financing private plans. Employees, as a whole, might be injured rather than aided if such cost increases resulted in slowing down the rate of frowth of private retirement plans.
>
> In view of the serious issues involved in the integration of private plans with the social security system, your committee believes that it is desirable

to postpone action on this issue pending further study of this problem. More specifically, your committee plans to consider this overall problem again at the earliest opportunity, possibly in connection with future tax reform or social security legislation. However, your committee believes that no further integration of social security and pension benefits should be allowed under any further regulations issued by the Secretary of his delegate at least until June 30, 1975." (Emphasis added.)

See also H.Conf.Rep. No. 93-1280, (1974) 3 Cum.Bull. 415, at 441, and the Supplemental Views of Committee members James Corman and Sam Gibbons, H.Rep. No. 93-779, (1974) 3 Cum.Bull. 409, at 412-13.

Could this same Congress which sought to limit its previously adopted Social Security offset have intended, as the court below concluded, to expand the possibility of offsets into the area of Worker's Compensation? Amicus contends Congress clearly would not have had such intentions.

Thus, even though § 401(a)(5) speaks of "retirement benefits", Congress has always been specifically speaking of

Social Security retirement benefits. It cannot be overemphasized that the only congressional intent discernible from the complete legislative history of 26 U.S.C. § 401(a)(5) is concerned with avoiding prohibited discrimination in the integration of Social Security retirement benefits with private pension benefits. To argue that § 401(a)(5) was intended to also provide an exception to the general rule of nonforfeitability for Worker's Compensation offsets stretches the imagination too far.

2. Worker's Compensation benefits are not "retirement" benefits within the meaning of I.R.C. § 401(a)(5).

This Court has recognized, especially in its recent decisions, the unique nature of retirement benefits. These decisions have characterized retirement pensions, as opposed to Worker's Compensation, as an "additional form of compensation". Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716, 2723 (1978). Similarly, this court found in Alabama Power Co. v. Davis, 431 U.S. 581, 593 (1977), that "the 'true nature' of the private

pension payment is a reward for length of service."[5/]

Worker's Compensation benefits, on the other hand, can by no stretch of the imagination be considered "retirement" benefits within the meaning of § 401(a)(5). Quite simply stated, retirement pension benefits are payments based on past labor and are deferred wages. (See Inland Steel v. NLRB, 170 F.2d 247 (7th Cir. 1948), cert. den. 336 U.S. 960 (1949); President's Commissions on Corporate Pension Funds, Public Policy and Private Pension Programs (1965), at 39; and H.Rep. No. 93-807, Comm. Ways and Means, (1974) U.S. Code Cong. & Admin. News 4719.)

5/ The fact that private retirement pensions are a special and perhaps unique form of compensation has been further underscored by the court's decision in Daniel v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 439 U.S. 551, 99 S.Ct. 790 (1979), and Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S.Ct. 802 (1979). In Daniel, the court distinguished pensions from securities, while in Hisquierdo, the court noted that private pension benefits were also different in kind from public (or federal) retirement benefits, 99 S.Ct., at 805, 813 n. 24.

This characterization is underscored by the fact that it is common practice in collective bargaining to consider employer pension contributions as part of the total wage package during wage and benefit negotiations. See McGill, Preservation of Pension Benefit Rights (Pension Research Council, 1972), at 45. Similarly, during the debate on ERISA, the House Ways and Means Committee and Senate Finance Committee clearly recognized the deferred wages nature of retirement pension benefits. See H.R.Rep. No. 93-807, S.Rep. No. 93-383, reprinted in (1974) U.S. Code Cong. & Admin. News 4719, at 4930. The Joint Conference Committee showed that it understood retirement benefits to be different from disability benefits (such as Worker's Compensation). Thus, it stated:

> "Under the conference substitute, the term 'accrued benefits' refers to pension or retirement benefits. The term does not apply to ancillary benefits, such as payment of medical expenses (or insurance premiums for such expenses), or disability benefits which do not exceed the normal retirement benefit payable at age 65 to an employee

> with comparable service under the plan, or to life insurance benefits payable as a lump sum." (1974) U.S. Code Cong. & Admin. News 5054. (Emphasis added.)

Worker's Compensation, on the other hand, is intended to be compensation for hardship due to employment-connected injury and may include recovery for loss of future wages and injury. Stong v. Bucyrus-Erie Co., 472 F.Supp. 1089 (E.D. Wis. 1979), appeal pending No. 80-1755 (7th Cir.); see Larson, Workmen's Compensation, Vol. 1, §§ 1.01-2.30. As Judge Pratt stated in Utility Workers Union v. Consumers Power Co., 453 F.Supp. 447, 455-56 (E.D.Mich. 1978):

> ". . . disability insurance compensates workers for lost income due to non-occupational illness and workmen's compensation laws protect workers against the loss of income due to work-related illness.
>
> * * *
>
> Pensions, in contrast, represent deferred income, or other benefits foregone by the worker in hopes of a more secure retirement." (Citations omitted.)

The distinction between retirement pensions and Worker's Compensation is

further highlighted by the tax treatment received by each -- deferred pension income is taxed as income when paid out and Worker's Compensation is not taxed as income since it is remedial in nature and not income available for retirement. I.R.C. § 104, 26 U.S.C. § 104(a).[6/]

The views of this Court and Congress

6/ Internal Revenue Code § 1.104-1(b), 26 C.F.R. § 1.104(b), states:

> "(b) Amounts received under workmen's compensation acts. Section 104(a)(1) excludes from gross income amounts which are received by an employee under a workmen's compensation act (such as the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 18), or under a statute in the nature of a workmen's compensation act which provides compensation to employees for personal injuries or sickness incurred in the course of employment . . . . However, section 104(a)(1) does not apply to a retirement pension or annuity to the extent that it is determined by reference to the employee's age or length of service, or the employee's prior contributions, even though the employee's retirement is occasioned by an occupational injury or sickness." (Emphasis added.)

have, of course, been supported by the experts in pension analysis and income maintenance theories. Virtually every discussion by such experts of "retirement" income focuses on income available to older individuals from sources on which retirees can plan their retirement in advance. Thus, they have developed the metaphor of the three-legged retirement income stool (savings, Social Security and private pensions) which has been constantly used in discussions of the nature and expectations of our income maintenance system. Worker's Compensation has not been discussed in this light, simply because it is not "retirement" income.

For example, in a recent conference on the "Economics of Aging" held by the National Journal in December, 1978, numerous speakers addressed the question of retirement income for the elderly. Robert Ball, former Commissioner of Social Security and presently senior scholar at the National Academy of Sciences' Institute of Medicine, in describing the present system of retirement income security,

states:

> "We have a system that I like to think of as a four-tier system. One is the nearly universal contributory social security program, and then on top of that are private pension plans and career plans for government employees supplementary social security. On top of that, and quite a different thing, I think, are the savings which individuals make on their own on an individual voluntary basis. And underlying the whole, of course, is the means-tested program of supplemental security income." "The Economics of Aging" in National Journal Conference proceedings, p. 7 (1978).

Mr. Ball's comments reflect the general understanding of those who spoke at the conference and who have written on the subject of "retirement" income. None of the authorities have ever viewed Worker's Compensation as part of any retirement income program. See, e.g. Salisbury, "Retirement Income and the Economy", September 20, 1980, National Journal, at 1584; McGill, Fundamentals of Private Pensions (4th ed. 1979).

Unfortunately, the Third Circuit below failed to recognize this crucial distinction

between pension benefits and Worker's Compensation benefits. The court below presumed it was offsetting benefits which were similar in kind, thus producing a rational result. On the contrary, the Third Circuit's result when viewed in light of the unique nature of pension benefits that has been the underpinning of our nation's income maintenance system and the decisions of this Court produces an illogical result. The pension recipients, petitioners herein, will only receive all the benefits they have earned if the Worker's Compensation offset of respondent's pension plan is voided by this Court.

II. SUMMARY CONCLUSION

For all the reasons stated herein, amicus Gray Panthers urge this Court to reverse the court below and rule in favor of the pension recipients.

Respectfully submitted,

GILL DEFORD
NEAL S. DUDOVITZ
PAUL S. NATHANSON

By GILL DEFORD

Attorneys for Amicus Curiae
Gray Panthers